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Office of Administrative Law Judges
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Issue Date: 09 December 2003

Case Nos. 2002-BLA-00086
2002-BLA 00133

In the Matter of:
JOAN WALLACE, on behalf of the
Estate of ETHEL EVERSOLE, deceased,
Widow of J.C. EVERSOLE,
Claimant,

v.

PEABODY COAL COMPANY,
Employer,
and
OLD REPUBLIC INSURANCE COMPANY,
Carrier,
and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Joseph Kelley, Esq.
On behalf of Claimant

W. William Prochot, Esq.
On behalf of Employer

Mary Sue Taylor, Esq.
On behalf of Director

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

**DECISION AND ORDER SECOND REMAND – AWARDING LIVING MINER
BENEFITS AND AWARDING SURVIVOR BENEFITS**

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of

the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.¹

On December 18, 2000, this case was remanded to the undersigned by the Benefits Review Board for further proceedings consistent with its decision and order.² Claimant requested a decision on the record. Counsel for Employer submitted a brief on remand, while counsel for Claimant did not.

ISSUES

The issues in this case are:

1. Whether Miner's total disability was due, at least in part, to coal workers' pneumoconiosis; and
2. Whether Miner's death was due to coal workers' pneumoconiosis.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

J.C. Eversole ("Miner") filed an initial claim for benefits under the Act on August 13, 1986. (DX 27-135). The District Director, Office of Workers' Compensation Programs ("OWCP") denied Miner's application on September 26, 1986. (DX 27-68). Miner did not appeal the denial. On January 22, 1993, Miner filed a duplicate application for benefits. (DX 2). The District Director issued an order awarding benefits, to which Employer appealed and requested a formal hearing. (DX 24). Miner died on August 19, 1994, before a formal hearing was held. (DX 29). Ethel Eversole ("Widow"), Miner's wife, filed an application for survivor benefits on September 26, 1994. (DX 29). Miner's duplicate claim was remanded to the OWCP, where it was consolidated with Widow's claim for survivor benefits. (DX 29). On February 24, 1995, the Director, OWCP denied Widow's application and retained the award of benefits on Miner's duplicate claim. (DX 29). The living miner and survivor claims were transferred to the Office of the Administrative Law Judges for a formal hearing on July 24, 1995. (DX 30).

¹The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr" refers to the official transcript of this proceeding.

Following a formal hearing, the undersigned issued a decision and order denying living miner benefits and denying survivor benefits. Specifically, living miner benefits were denied because the evidence did not establish a material change in conditions, nor did it establish the existence of pneumoconiosis. The undersigned did determine that Miner was totally disabled due to cancer unrelated to his coal mine employment. The survivor claim was denied because the evidence did not establish the existence of pneumoconiosis, nor did it establish that Miner's death was due to pneumoconiosis. Widow sought review before the Benefits Review Board ("Board"). The Board issued a decision and order on July 22, 1999, affirming in part, and vacating in part, the undersigned's decision and order denying benefits. The Board found that the evidence did establish a material change in conditions since the undersigned found Miner to be totally disabled. The Board also vacated the undersigned's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis under § 718.202(a)(4), and that the evidence was insufficient to prove that Miner's total disability was due, at least in part, to Miner's pneumoconiosis under the former version of § 718.204(b). With regard to the survivor's claim, the Board vacated the undersigned's finding that the evidence is insufficient to establish the existence of pneumoconiosis under § 718.202(a)(4), as well as the undersigned's finding that the evidence does not support a finding of death to pneumoconiosis under § 718.205(c)(2).

On October 27, 1999, the undersigned issued a decision and order on remand awarding living miner benefits and survivor benefits. Employer sought review of the award before the Board. On December 18, 2000, the Board issued a decision and order affirming in part, vacating in part, and remanding the award of benefits to the undersigned for further consideration. The Board affirmed the undersigned's finding that the evidenced established the existence of pneumoconiosis under § 718.202(a)(4). The Board vacated the undersigned's findings that pneumoconiosis contributed to Miner's total disability under the former version of § 718.204(b). The Board also vacated the undersigned's determination that pneumoconiosis was a substantially contributing cause or factor leading to Miner's death under § 718.205(c)(2). On May 31, 2001, the undersigned issued an order allowing briefs on remand. Counsel for Widow and Employer filed briefs on remand.

Subsequent to the Board's order vacating and remanding the undersigned's award of living miner and survivor benefits, Joseph Kelley, former counsel for the deceased Miner and present counsel for Widow, advised the undersigned that Widow passed away on April 14, 2001. On August 10, 2001, the undersigned issued an order remanding the living miner claim to the OWCP so that the estate of Widow could be substituted as the claimant and for the living miner and survivor claims to be consolidated. A claims examiner from the OWCP sent a letter addressed to the "Estate of Ethel Eversole" to the last known address of Widow requesting the name of the person to contact on behalf of the estate as well as a copy of the appointment of the administrator or executor of the estate. (DX 31). The claims examiner stated that, in compliance with the undersigned's order, the claims had been returned to the OWCP to allow the Estate of Widow to be substituted as a party to the record. The next document in the record is a letter from the same OWCP claims examiner addressed to "Ms. Wallace." (DX 31). The claims examiner stated that, in compliance with the undersigned's order, Joan Wallace had been substituted as a party to the record. On November 30, 2001, the OWCP addressed a letter to "Mrs. Eversole" under the caption of "Ethel Eversole, Joan Wallace for Estate" and sent it to the

address of Joan Wallace announcing that the Mrs. Eversole's claim had been transferred to the Office of the Administrative Law Judges. (DX 32). The living miner and survivor claims were placed on the docket of Administrative Law Judge Daniel Roketenetz, who issued a Notice of Hearing on April 18, 2002. On June 11, 2002, Administrative Law Judge Roketenetz issued a notice rescheduling the hearing from August 6, 2002 to August 8, 2002. On July 1, 2002, Kelley filed a motion to cancel hearing, informing Administrative Law Judge Roketenetz that the most recent procedural history of the case revealed that the Board had vacated and remanded the award of living miner and survivor benefits back to the undersigned. Administrative Law Judge Roketenetz issued an order to show cause on July 9, 2002 why the motion for a decision on the record should not be granted. On July 10, 2002, Employer filed a motion to dismiss for lack of a proper party in interest or because the claims have been abandoned, or in the alternative, for a decision on the record. Administrative Law Judge Roketenetz issued an order on July 22, 2002 granting the motion for a decision on the record, denying Employer's motion to dismiss, and granting the parties thirty-days for file a brief. Kelley and Employer filed briefs with Administrative Law Judge Roketenetz in August 2002. On October 1, 2002, Administrative Law Judge Roketenetz issued an order of clarification, wherein he reassigned the claims to the undersigned for adjudication in accordance with the Board's December 18, 2000 decision and order.

On August 22, 2003, the undersigned issued an order to show cause directing Joan Wallace to show cause as to why the living miner and survivor claims should not be denied by reason of abandonment. Joan Wallace was directed to make a showing of whether the estate of Widow ever submitted a written notice to the OWCP in order to be substituted as a party, and she was also directed to make a showing of the actions taken on behalf of the estate to pursue the living miner and survivor claims with due diligence. Both parties were directed to address the issue of whether the representative of the estate of Widow, may or may not, if it has not already done so, submit a written notice that the estate's rights may be prejudiced by a decision of an adjudication officer so that it may be added as a party, which is to be documented by a signed affidavit from the representative of the estate of Widow. Briefs were filed by attorneys Mary Sue Taylor on behalf of the OWCP, W. William Prochot on behalf of Employer, and Joseph Kelley on behalf of the estate of Widow.

Medical Evidence

I incorporate by reference, as if fully re-written herein, the chest x-rays, pulmonary function tests, arterial blood gas studies, narrative medical reports, hospital records, treatment records, and deposition testimony, contained in the undersigned's December 12, 1997 and October 27, 1999 decisions and orders, to the extent that they are not inconsistent with any medical evidence reviewed herein.

DISCUSSION AND APPLICABLE LAW

PROPER PARTY

Although it occurs with regularity over the history of the Act, the applicable regulations implementing the Federal Coal Mine Health & Safety Act of 1969, as amended at 29 C.F.R. Parts 718 and 725 do not expressly authorize the substitution of estates on behalf of miners or survivors who die before a final determination on their claim for benefits has been reached. There are no provisions in 29 C.F.R. Part 18, which provide the rules of practice and procedure for administrative hearings before the Office of the Administrative Law Judge, for the substitution of estates on behalf of miners or survivors who die before a final determination of their claim for benefits has been reached. However, 29 C.F.R. § 18.1(a) authorizes the use of the Federal Rules of Civil Procedure in any situation not provided for or controlled by Part 18, any statute, executive order, or regulation. The Federal Rules of Civil Procedure authorize a court order allowing the substitution of the proper party if a party dies and the claim is not thereby extinguished upon a motion for substitution made by any party or by the successors or representatives of the deceased party. Fed.R.Civ.P. 25(a)(1). Such a motion must be served on all parties. *Id.*

The Board vacated and remanded the undersigned's decision and order – awarding survivor benefits on December 18, 2000. Ethel Eversole died on April 14, 2001. At the time of her death, a determination on whether she was entitled to benefits had not occurred. The undersigned remanded her claim to the OWCP to have the representative of Ethel Eversole's estate substituted on her behalf. The record does not show that any successor or any representative of the estate of Ethel Eversole ever filed a motion to be substituted on behalf of Ethel Eversole. Rather, a claims examiner from the OWCP notified Joan Wallace that she had been substituted on behalf of Ethel Eversole in accordance with the undersigned's order and forwarded the claim back to the Office of the Administrative Law Judges. Upon the return of the claim, Employer filed a motion to dismiss for lack of a proper party and for abandonment before Administrative Law Judge Roketenetz. Employer filed an amended version of that motion with the undersigned when the claim was properly transferred to the undersigned to comply with the Board's December 18, 2000 order vacating and remanding the claims.

In response to the undersigned's order to show cause, Joan Wallace filed a notarized affidavit regarding the actions she has taken in pursuing the living miner and survivor claims. Joan Wallace stated that she is the daughter of J.C. and Ethel Eversole. She wrote that she had reviewed documentation indicating that the Department of Labor wrote to her mother's address to request the name of the representative of her mother's estate. Joan Wallace then stated, "[t]he requested information was obviously provided, and it may have been provided in writing, because on November 5, 2001 the office in Pikeville sent a letter to my address at 132 Maple Hill Lane in Beaver Dam, Kentucky indicating that my name, 'for the estate of Mrs. Eversole' would appear on future correspondence regarding these black lung claims." Joan Wallace stated that, "[w]hile I did not personally submit written notice to the office in Pikeville for substitution of my name on the documents, I cannot say that written notice was not sent." She also stated that the claims had not been abandoned. The undersigned had ordered Joan Wallace to provide in the affidavit all actions taken on behalf of the estate to pursue the living miner and survivor claims. In her affidavit, Joan Wallace did not describe one single action taken to pursue the living miner claim or the survivor claim.

After Ethel Eversole died and before the undersigned issued the August 22, 2003 order to show cause, the only actions taken to pursue the living miner and survivor claims were by Joseph Kelley. However, there is no documentation in the record that anyone had retained Kelley to represent the estate of Ethel Eversole in pursuing the living miner or survivor claims. In *Kowaleski v. Director, OWCP*, 879 F.2d 1173 (3rd Cir. 1989), the Third Circuit Court of Appeals admonished counsel for the claimant to recognize the limits of client representation after the attorney pursued an appeal in the name of the pre-deceased spouse of a deceased miner. *Kowaleski*, 879 F.2d at 1175, FN 2. When attorney Kelley filed Claimant's response to the undersigned's order to show cause with Joan Wallace's affidavit attached, he did not indicate the party he represented.

The record establishes that, after the death of Ethel Eversole in 2001 and prior to the undersigned's order to show cause in 2003, the only action taken to pursue the living miner and survivor claims was undertaken by an attorney who apparently did not represent any party. The OWCP claims examiner somehow obtained the name and address of Joan Wallace, but the record does not contain any evidence that the successors or representatives of Ethel Eversole engaged in any action to pursue the living miner or survivor claims. Joan Wallace, aside from providing the 2003 affidavit, has not engaged in any activity to pursue the living miner or survivor claims. No successor or representative of Ethel Eversole has provided any evidence that they filed a motion to be substituted on behalf of Ethel Eversole. Therefore, absent a motion, I find that OWCP improperly substituted Joan Wallace on behalf of Ethel Eversole. Since Joan Wallace was improperly substituted, I find that there is no proper party presently pursuing the living miner and survivor claims. The undersigned issued an order to show cause why dismissal should not be granted on August 22, 2003, and Joan Wallace was provided with a reasonable amount of time to respond. Attorney Kelley filed a response to the order to show cause on September 5, 2003, which included Joan Wallace's affidavit. Therefore, I dismiss Joan Wallace as a party to this proceeding in accordance § 725.465(b). She is not eligible for benefits in an individual capacity or in a capacity as the representative of the estate of Ethel Eversole.

Nevertheless, payments have been made prior to a final adjudication by the Black Lung Disability Trust Fund. Therefore, the responsible operator identified by the OWCP cannot be dismissed upon the motion or written agreement of the Director. See § 725.465(d). In response to the undersigned's order to show cause, the Director stated that the Trust Fund has paid benefits in the amount of \$55,581.07 on Miner's and Widow's claim. After citing § 725.465(d), the Director stated its objection to dismissal of the claim prior to final adjudication of the matter.¹ Since the Director has not moved or agreed to allow dismissal, this matter must proceed to a formal adjudication regarding Peabody Coal Company's liability to repay the Black Lung Disability Trust Fund for benefits paid on the living miner and survivor claims.

³ The Director moved for the record to be held open for the taking of a statement or deposition from Joan Wallace concerning the issue of who is the correct party plaintiff in this case. Since Joan Wallace provided a signed and notarized affidavit in response to the order to show cause, the Director's motion is moot.

LIVING MINER CLAIM

Mr. Eversole's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, a claimant must establish, by a preponderance of the evidence, the following elements:

1. That he suffers from pneumoconiosis;
2. That the pneumoconiosis arose, at least in part, out of coal mine employment;
3. That the claimant is totally disabled; and
4. That the total disability is caused by pneumoconiosis.

See §§ 719.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore*, 9 B.L.R. 1-4, 1-5 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-212 (1985). Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987). Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. See *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Following Miner's death in 1994, Widow filed a surviving spouse claim for benefits and pursued Miner's living miner claim. Employer did not object to Widow's pursuit of the living miner claim after Miner's death.

Pneumoconiosis is defined by the regulations:

For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.

(1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

Section 718.201(a).

In my October 27, 1999 decision and order, I found that the evidence established that Miner suffered from legal pneumoconiosis, which was manifested in the form of chronic obstructive pulmonary disease (“COPD”) arising, in part, out of exposure to coal mine dust under § 718.202(a)(4). Based on the parties stipulation that Miner engaged in coal mine employment for 36 years, I applied the rebuttable presumption found at § 718.203(b) and determined that Miner’s pneumoconiosis arose out of coal mine employment. The Board affirmed the finding of pneumoconiosis arising out of coal mine employment in their December 18, 2000 decision and order. Previously, in a decision and order dated July 22, 1999, the Board determined that Miner suffered from a totally disabling respiratory impairment in the form of lung cancer. Also in the July 22, 1999 decision and order, the Board found that a material change in conditions had been established through the finding of a totally disabling respiratory impairment. Therefore, the sole issue remaining for determination in the living miner claim is whether Miner’s total disability was due to his pneumoconiosis arising out of coal mine employment.

Total Disability Due to Pneumoconiosis

Since total disability has been established, Widow must now establish that Miner’s totally disabling respiratory impairment was due to pneumoconiosis. The amended regulations at § 718.204(c) contain the standard for determining whether Miner’s total disability was caused by Miner’s pneumoconiosis. Section 718.204(c)(1) determines that a miner is totally disabled due to pneumoconiosis if pneumoconiosis, as defined in § 718.201, is a “substantially contributing cause” of the miner’s totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a “substantially contributing cause” of the miner’s disability if it has a material adverse effect on the miner’s respiratory or pulmonary condition or if it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. §§ 718.204(c)(1)(i) and (ii). Section 718.204(c)(2) states that, except as provided in § 718.305 and § 718.204(b)(2)(iii), proof that the Miner suffered from a totally disabling respiratory or pulmonary impairment as defined by §§ 718.204(b)(2)(i), (ii), (iv), and (d) shall not, by itself, be sufficient to establish that the miner’s impairment was due to pneumoconiosis.

Except as provided by § 718.204(d), the cause or causes of a miner’s total disability shall be established by means of a physician’s documented and reasoned medical report. § 718.204(c)(2). The Sixth Circuit Court of Appeals has stated that pneumoconiosis must be more than a “de minimus or infinitesimal contribution” to the miner’s total disability. *Peabody Coal Co. v. Smith*, 12 F. 3d 504, 506-507 (6th Cir. 1997). The Sixth Circuit has also held that a claimant must affirmatively establish only that his totally disabling respiratory impairment (as found under § 718.204) was due ‘at least in part’ to his pneumoconiosis. *Cf.* 20 C.F.R. 718.203(a).” *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1988); *Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 218 (6th Cir. 1996)(opinion that miner’s “impairment is due to his combined dust exposure, coal workers’ pneumoconiosis as well as his cigarette smoking history” is sufficient). More recently, in interpreting the amended provision at § 718.204(c), the Sixth Circuit determined that entitlement is not precluded by “the mere fact that a non-coal dust related respiratory disease would have left the miner totally disabled even without exposure to coal dust.” *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir.

2001). A miner “may nonetheless possess a compensable injury if his pneumoconiosis materially worsens this condition.” *Id.* The reasoned medical opinions of those physicians who diagnosed the existence of pneumoconiosis and that Miner was totally disabled are more reliable for assessing the etiology of Miner’s total disability. *See, e.g. Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995).

The finding of a totally disabling respiratory impairment under § 718.204(b) was based on Miner’s lung cancer. The medical evidence clearly establishes that Miner’s lung cancer was the result of cigarette smoking. The opinions of Drs. Norsworthy, Branscomb, Caffrey, as well as others, establish that Miner would have developed lung cancer resulting in total disability even without exposure to coal dust. The physicians of record unanimously attribute Miner’s lung cancer to his extensive history of cigarette smoking. There is also no evidence that Miner’s pneumoconiosis worsened Miner’s lung cancer. However, the Sixth Circuit’s holding in *Kirk* would still permit a finding that Miner’s total disability was due to pneumoconiosis, if Widow can show that pneumoconiosis had a materially adverse effect on Miner’s pulmonary condition. *Kirk*, 264 F.3d at 612 (a compensable injury may exist if substantial evidence shows the existence of pneumoconiosis that made an already poor condition worse). Claimant established the existence of pneumoconiosis through medical evidence that established that Miner suffered from COPD due, in part, to his exposure to coal dust. Therefore, if Miner’s COPD (legal pneumoconiosis) had a materially adverse effect on Miner’s pulmonary condition, then Widow will have established that Miner’s total disability was due to pneumoconiosis.

A substantial amount of Miner’s medical evidence was developed during two distinct time periods, 1986 and 1993-1994. In order to determine whether Miner’s CWP had a materially adverse effect on his pulmonary condition, the medical evidence developed in 1986 must be compared to the medical evidence developed in 1993-1994. Dr. Wong examined Miner in 1986 and found that Miner suffered from a functional impairment due to the combination of pneumoconiosis and emphysema. He examined Miner, conducted objective testing, and considered an accurate account of Miner’s smoking and coal mine employment histories. He set forth clinical findings and observations, and his reasoning is supported by adequate data. I find that Dr. Wong’s opinion is entitled to probative weight limited by its remoteness in time to Miner’s death.

Also in 1986, Dr. Anderson diagnosed the existence of CWP, but he found that Miner’s PFT and ABG values were above the level indicating disability. Dr. Lane found no evidence of CWP, but he did detect COPD. He found that Miner suffered from a mild obstructive impairment and mild hypoxemia. Dr. Lane testified that Miner’s COPD was due solely to Miner’s history of extensive cigarette smoking. He considered an accurate account of Miner’s smoking and coal mine employment histories. Dr. Lane’s opinion on the etiology of Miner’s COPD is contrary to the undersigned’s finding that Miner suffers from legal pneumoconiosis in the form of COPD arising of coal dust exposure. Accordingly, I find that Dr. Lane’s opinion is entitled to a lesser degree of probative weight. His opinion is also limited by its remoteness in time from Miner’s death in 1994.

Dr. Gallo also opined in 1986 that Miner had COPD, but not CWP. Dr. Gallo did not provide an opinion as to the etiology of Miner's COPD, but he testified that Miner had no disability arising out of his employment as a coal miner. Based on the PFT he conducted, he assessed a mild obstruction. He also testified that Miner was capable of performing most coal mining jobs, except those that require severe or prolonged exertion. Dr. Gallo considered an accurate account of Miner's smoking and coal mine employment histories. However, his opinion is contrary to the undersigned's finding that Miner suffered from legal pneumoconiosis in the form of COPD arising of coal dust exposure. I find that Dr. Gallo's opinion is entitled to a lesser degree of probative weight. The probative value of Dr. Gallo's opinion is limited by its remoteness in time to Miner's death.

Dr. Simpao examined Miner in September of 1986, found that Miner suffered from CWP, and opined that Miner was totally disabled based on his abnormal x-ray, PFT, and ABG. He commented that the PFT he performed indicated a mild obstructive impairment. Overall, he assessed that Miner was suffering from a moderate pulmonary impairment. He marked the box indicating that Miner's CWP was the source of his pulmonary impairment. Dr. Simpao conducted a physical examination, submitted Miner to objective testing, and recorded accurate accounts of Miner's smoking and coal mine employment histories. He also recorded Miner's subjective complaints. Dr. Simpao set forth clinical observations and findings. His opinion is reasoned and documented. I find that Dr. Simpao's opinion is entitled to probative weight, however it is limited by its remoteness in time to Miner's death in 1994.

Dr. Penman was the last physician to examine Miner in 1986. He diagnosed CWP, also finding that Miner was suffering from an airways obstruction. Dr. Penman concluded that Miner's lung function was impaired, but he did not provide an opinion as to the etiology of Miner's impairment. Dr. Penman's opinion confirms the existence of a pulmonary impairment, but it cannot support a finding of total disability due to pneumoconiosis.

Dr. O'Bryan examined Miner in February and March of 1993. In February 1993, he found an x-ray to be negative for pneumoconiosis, but he diagnosed COPD, possible moderate obstructive ventilatory impairment, and a right lung mass. He attributed Miner's obstructive lung disease to cigarette smoking and coal dust exposure, but he opined that cigarette smoking was more important in developing the impairment. Dr. O'Bryan concluded that 50% of Miner's impairment was due to COPD, and he considered Miner's cardiac condition another factor that must be considered. He performed a clinical examination, submitted Miner to objective testing, and considered accurate accounts of Miner's smoking and coal mine employment histories. His assessment of a moderate impairment is tempered by his comment that Miner may not have exhibited his best effort. However, Dr. Kramal found the PFT Dr. O'Bryan conducted to be acceptable. Over the next month, Miner presented to Dr. O'Bryan on three more occasions in regards to Miner's right lung mass. After the first two visits, Dr. O'Bryan's diagnoses included right lung density, obstructive lung disease, mostly chronic (sic) bronchitic (moderate impairment), and organic heart disease. He attributed Miner's moderate COPD to many years of smoking and working in a coal mine. He also found active bronchitis. Dr. O'Bryan added that getting Miner over his bronchitis would improve his breathing tests. Following the third visit, Dr. O'Bryan determined that Miner's lesion needed to be surgically removed. Dr. O'Bryan set

forth clinical observations and findings, and his reasoning is supported by adequate data. His opinion is reasoned and documented. I find that Dr. O'Bryan's opinion is entitled to probative weight.

Subsequent to Dr. O'Bryan's recommendation, Miner's lesion was surgically removed and resected by Dr. Gilliam. Dr. Gilliam's impression was status post right thoracotomy for carcinoma of the lung and obstructive lung disease that was mostly bronchitis with moderate impairment.

Dr. Norsworthy began treating Miner in December of 1993, and continued to follow Miner until his death. Initially, Dr. Norsworthy reviewed records from Dr. Wong and possibly from Dr. O'Bryan or Dr. Anderson. Dr. Norsworthy testified that those records diagnosed Miner as suffering from CWP and COPD. He did not perform any diagnostic testing himself, even though he did diagnose CWP on his own because the testing had already been done and Miner was receiving benefits for CWP.³ He continued to treat Miner, eventually diagnosing terminal pulmonary malignancy on Miner's vocal cords, which was possibly metastatic. Dr. Norsworthy also noted that Miner had a history of CWP and COPD. Expounding on the letters he authored in 1997, Dr. Norsworthy testified that, when Miner was first diagnosed, he had a malignancy that might have been surgically resectable. But, because of Miner's overall lung condition from the combination of the pneumoconiosis and the underlying COPD, it was not an option that was offered to Miner. He treated Miner until he died in July of 1994.

Dr. Norsworthy authored two letters after Miner's death in addition to his deposition testimony. Dr. Norsworthy's letters and deposition testimony collectively show that Dr. Norsworthy believed that Miner was totally disabled due to pneumoconiosis arising out of coal mine employment before the onset of Miner's lung cancer. Dr. Norsworthy began treating Miner after a neoplasm in Miner's lung was determined to be a malignancy. He stated that Miner's lung carcinoma was not caused by his CWP. However, he found that Miner's occupational lung disease substantially impaired Miner's breathing, leaving him with little residual lung capacity. He derived these opinions from the opinions of physicians who examined and treated Miner prior to the beginning of his treatment relationship with Miner. Dr. Norsworthy testified that he did not conduct his own testing to reach his own conclusion or to verify the opinions from the other physicians regarding the existence of CWP or the level of Miner's pulmonary capacity. He did testify that he relied on diagnoses of COPD and atherosclerotic heart disease from Dr. Wong, but Dr. Wong's diagnoses do not support a finding of total disability due to pneumoconiosis arising out of coal mine employment. Since Dr. Norsworthy did not identify sufficient objective medical evidence, I find that his opinion is not reasoned and documented for the sole purpose of

4 When asked if he ever personally diagnosed CWP, Dr. Norsworthy testified, "[w]ell, yeah, it's x-ray changes, but I did not do any further diagnostic testing. It had already been done and he had already been awarded the benefits." At least two meanings can be inferred from Dr. Norsworthy's statement: 1). Dr. Norsworthy interpreted a chest x-ray as revealing CWP; or 2). chest x-ray changes are the method for diagnosing CWP, but Dr. Norsworthy did not personally interpret a chest x-ray. Since Dr. Norsworthy was treating Miner for lung cancer and based on the context of the deposition as a whole, I find that the most reasonable inference to draw from Dr. Norsworthy's testimony is that he interpreted a chest x-ray as revealing the presence of pneumoconiosis, but that he did not conduct his own pulmonary function testing. He did, however, review the pulmonary function testing conducted by other physicians.

identifying whether Miner's totally disabling respiratory impairment was due to pneumoconiosis. Therefore, under this subsection I find that Dr. Norsworthy's opinion is entitled to a lesser degree of probative weight.⁴

Several consultative opinions were rendered after Miner died, the first of which was offered by Dr. Caffrey. He could not state with certainty whether or not Miner had CWP, but for the purposes of his report, he assumed that Miner suffered from simple CWP. He opined that Miner suffered from COPD, in the form of chronic bronchitis and emphysema, which was solely attributable to cigarette smoking since cigarette smoking is the number one cause of chronic bronchitis and emphysema. He added that, if the pulmonary impairment caused by Miner's cigarette smoking was removed, Miner would not have had to retire from his previous coal mining. Moreover, Dr. Caffrey noted that Miner's simple CWP had no effect on his lung carcinoma. He reviewed and summarized Miner's medical records, setting forth his clinical findings. Dr. Caffrey's opinion contradicts the undersigned's finding that the evidence establishes that Miner's COPD was due, at least in part, to coal dust exposure. Therefore, I find that Dr. Caffrey's opinion is entitled to a lesser degree of probative weight. I recognize his credentials as a board-certified pathologist.

Dr. Branscomb issued the next consultative report. Similar to Dr. Caffrey's opinion, he found that Miner did not suffer from CWP, but assumed its existence for the purposes of his report. He opined that Miner suffered from COPD caused by cigarette smoking, as well as lung carcinoma as a result of Miner's devastating smoking history. Dr. Branscomb concluded Miner's simple CWP did not cause the COPD, nor did it cause Miner's lung carcinoma. He attributed any pulmonary disability that Miner suffered from to cigarette smoking and not to coal dust exposure. Dr. Branscomb reviewed and summarized Miner's medical records, setting forth clinical findings. He considered an accurate account of Miner's smoking and coal mine employment histories. Dr. Branscomb's opinion that Miner's COPD was caused solely by cigarette smoking is contradictory to the undersigned's finding that Miner suffered from legal pneumoconiosis at the time of his death in the form of COPD arising, at least in part, out of coal dust exposure. I find that Dr. Branscomb's is entitled to a lesser degree of probative weight. I recognize his credentials as a board-certified pulmonologist.

After reviewing Miner's medical records on January 11, 1995, Dr. Broudy issued a consultative report. Dr. Broudy summarized the findings contained in some of the medical records that he reviewed. He then opined, based on the records that he reviewed, that Miner's death was due to carcinoma of the lung from cigarette smoking and COPD that also arose from cigarette smoking. Dr. Broudy did not render an opinion regarding Miner's pulmonary capacity at the time of his death. Instead, he attributed Miner's COPD solely to cigarette smoking. Dr. Broudy's finding contradicts the undersigned's finding that Miner suffered from COPD arising, in part, from coal dust exposure. Therefore, Dr. Broudy's opinion is entitled to a lesser degree of probative weight.

⁵ My finding that Dr. Norsworthy's opinion offers minimal documentation and reasoning is not based on Dr. Norsworthy's inability to locate his medical records relating to Miner. It is based on Dr. Norsworthy's inability to set forth sufficient clinical observations and findings, and the lack of adequate data to support his reasoning.

In addition to lung cancer, the medical evidence establishes that Miner suffered from three other pulmonary impairments from 1986 until his death: COPD, emphysema, and chronic bronchitis. Furthermore, Miner's pulmonary condition was impaired by his cardiac condition. In 1986, physicians classified the pulmonary impairment created by Miner's COPD in varying degrees from not qualifying for disability to mild. By 1993, according to Dr. O'Bryan, Miner's pulmonary impairment was moderate. A comparison of the FEV₁ and FVC values from 1986 to 1993-1994 shows a decline in Miner's respiratory health. *See Kirk*, 264 F.3d at 612 (commenting that decrease in pulmonary capacity was of profound practical and medical importance to a miner while analyzing whether there was substantial evidence to support a finding that the miner's totally disabling respiratory impairment was due in part to pneumoconiosis arising out of coal dust exposure).

A comparison of the medical evidence between 1986 and 1993-1994 shows that Miner's respiratory impairment worsened from a mild impairment to a moderate impairment. Dr. O'Bryan's 1993 opinion, attributing 50% of Miner's moderate pulmonary impairment to COPD, establishes that Miner's legal pneumoconiosis had a materially adverse effect on his totally disabling respiratory impairment. Even though Drs. Branscomb and Caffrey assumed the existence of pneumoconiosis, their opinion on the etiology of Miner's totally disabling respiratory impairment was based on a predicate that is not supported by the preponderance of the evidence. Since their opinions were based on inaccurate foundations, I find their opinions to be insufficient to contradict the reasoned and documented opinion of Dr. O'Bryan. The opinions of Drs. Caffrey and Branscomb are patently ambiguous if they assume that pneumoconiosis exists, but opine that the specific form of pneumoconiosis the undersigned determined the evidence establishes does not exist. Miner's totally disabling respiratory impairment was due, at least in part, to his chronic obstructive pulmonary disease which was due, at least in part, to Miner's thirty-six years of coal dust exposure. Therefore, I find that Miner is totally disabled due to pneumoconiosis arising out of coal mine employment under § 718.204(c).

Entitlement

The preponderance of the evidence establishes that J.C. Eversole was totally disabled due to pneumoconiosis arising out of coal mine employment. The evidence does not establish the month of onset of J.C. Eversole's total disability due to pneumoconiosis arising out of coal mine employment. Therefore, benefits should have been payable to J.C. Eversole beginning with January 1993, which is the month during which J.C. Eversole filed his duplicate claim for benefits under the Act. *See* § 725.503(b). Benefits should have been augmented on behalf of Ethel Eversole, J.C. Eversole's dependent spouse. *See* §§ 718.204, 718.205. The last month for which J.C. Eversole was entitled to benefits was July 1994, which is the month before he died in 1994. *See* § 725.203(b).

Attorney's Fees

A representative seeking a fee for services on behalf of J.C. Eversole shall make an application to the undersigned Administrative Law Judge, which is to be filed and served on the undersigned and all parties within thirty-days of the issuance of this Decision and Order. The Parties have 10 days following receipt of any such application within which to file their

objections. The Act prohibits the charging of any fee in the absence of such approval. *See*, §§ 725.365 and 725.366.

SURVIVOR CLAIM

Mrs. Eversole filed her survivor's claim on September 26, 1994. Entitlement to benefits must be established under the regulatory criteria at Part 718. *See Neeley v. Director, OWCP*, 11 B.L.R. 1-85 (1988). The Act provides that benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis. § 718.205(a). In order to receive benefits, the claimant must prove that:

- 1). The miner had pneumoconiosis;
- 2). The miner's pneumoconiosis arose out of coal mine employment; and
- 3). The miner's death was due to pneumoconiosis.

§§ 718.205(a). Failure to establish any of these elements by a preponderance of the evidence precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987). I have already determined that Miner suffered from pneumoconiosis arising out of coal mine employment at the time of his death.

Death Due to Pneumoconiosis

In order for Widow to be entitled to survivor benefits, she must prove that Miner's death was due to pneumoconiosis. Subsection 718.205(c) applies to survivor's claims filed on or after January 1, 1982 and provides that an eligible survivor will be entitled to benefits if any of the following criteria are met:

1. Where competent medical evidence establishes that pneumoconiosis was the cause of the Miner's death, or
2. Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where death was caused by complications of pneumoconiosis, or
3. Where the presumption set forth in § 718.304 (evidence of complicated pneumoconiosis) is applicable.

20 C.F.R. § 718.205(c). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. § 718.205(c)(5). The presumption set forth in § 718.304 is not applicable. Therefore, in order for Widow to be entitled to benefits, she must show that pneumoconiosis was the direct cause of Miner's death or that pneumoconiosis hastened Miner's death.

Miner's Certificate of Death lists the date of death as August 19, 1994. Dr. Eric Norsworthy completed the cause of death section. He listed the immediate cause of death as lung cancer. Chronic obstructive pulmonary disease and coal miners' pneumoconiosis were listed as underlying causes of death. A death certificate, in and of itself, is an unreliable report of the miner's condition and it is error for an administrative law judge to accept conclusions contained in such a certificate where the record provides no indication that the individual signing the death certificate possessed any relevant qualifications or personal knowledge of the miner from which to assess the cause of death. *Smith v. Camco Mining, Inc.*, 13 B.L.R. 1-17 (1989); *Addison v. Director, OWCP*, 11 B.L.R. 1-68 (1988).

Dr. Norsworthy completed a discharge summary on July 27, 1994 from Ohio County Hospital, noting that arrangements had been made for maximum support during Miner's final time at home. Dr. Norsworthy's discharge diagnosis was terminal pulmonary malignancy with a second malignancy, possible metastatic involving the vocal cords. He commented that Miner had been undergoing radiation therapy for the lesion in his vocal cord area, but it was determined that Miner was not strong enough to undergo this type of treatment. Dr. Norsworthy noted that Miner had been diagnosed with lung cancer over one-and-one-half years ago, for which he received radiation therapy, but had a history of local metastatic disease in the chest. He stated that Miner's other conditions are coal miner's pneumoconiosis by history, long standing history of COPD, history of inferior myocardial infarction, and history of pneumonias in the past. Dr. Norsworthy attended to Miner in the final weeks of Miner's life. Over the last nine months of Miner's life, he was sent copies of all medical records relating to Miner's treatment for cancer from Dr. Prajapati, Briones, O'Bryan, and Dr. Edds. He discussed Miner's condition with Dr. O'Bryan.

I find that Dr. Norsworthy possessed the requisite qualifications and personal knowledge of Miner's medical condition from which to assess the cause of death. Dr. Norsworthy considered that Miner suffered from pneumoconiosis and he concluded that Miner's COPD and coal workers' pneumoconiosis were underlying causes of Miner's death. Dr. Norsworthy provided further support for the conclusion he rendered on the death certificate in his deposition. He testified that when Miner was first diagnosed with cancer, it was resectable at that time and might have been more responsive to chemotherapy. However, Dr. Norsworthy testified that Miner was not ever offered the option of surgery to resect the cancer because of his overall lung condition from the combination of the pneumoconiosis and underlying COPD. Therefore, I find that the death certificate is a reliable report that supports a finding that Miner's death was due to pneumoconiosis.

Dr. Gerald Edds, who examined Miner for a skin cancer on Miner's chin at the referral of Dr. Prajapati, wrote a letter to Dr. Norsworthy on July 15, 1994 after he found a large tumor of Miner's left vocal cord. He performed a laryngoscopy and discussed his findings with Dr. Prajapati. They both concluded that Miner should have a full course of radiation for treatment. However, he opined that it is doubtful that Miner could be cured without a laryngectomy. He stated that he had "been made to understand that this would not be medically feasible on [Miner]."

Dr. Broudy issued a consultative report on January 11, 1995 based on his review of Miner's medical records. He provided a brief summary of the evidence he reviewed. After reviewing the medical evidence, Dr. Broudy stated that it appears that Miner's death was due to carcinoma of the lung from cigarette smoking and chronic obstructive airways disease, which also arose from cigarette smoking. He opined that Miner's death was not caused or hastened by pneumoconiosis. He then added that the two B-readers who reviewed multiple films found no evidence of pneumoconiosis on any of the chest x-rays. Dr. Broudy did not expressly state that he assumed the presence of pneumoconiosis for the purpose of evaluating the cause of Miner's death, and I infer that he did not believe that pneumoconiosis existed at the time of Miner's death. I previously determined that the preponderance of the evidence establishes that Miner suffers from COPD due, at least in part, to coal dust exposure. Dr. Broudy found that Miner's COPD arising out of cigarette smoking was a cause of Miner's death. However, since a preponderance of the evidence establishes that Miner's COPD was due, at least in part, to his COPD, Dr. Broudy's opinion actually supports a finding that Miner's death was due, at least in part, to pneumoconiosis despite his express opinion that Miner's death was not caused or hastened by pneumoconiosis.

Dr. Caffrey issued a consultative report on August 8, 1995. He reviewed a copy of Miner's death certificate, multiple medical documents relating to Miner and a copy of the April 19, 1993 surgical pathology report following wedge resections of Miner's lung. However, Dr. Caffrey did not evaluate any surgical pathology slides and no autopsy was performed. He provided a brief summary of the medical records he reviewed. Dr. Caffrey assumed that Miner suffered from a mild degree of simple CWP, even though he held the opinion that Miner did not suffer from simple CWP. Since he assumed that the amount of CWP miner had would have only been a minimal amount, he opined that such a minimal amount would not have caused, contributed to, or hastened Miner's death. Rather, he opined that Miner died due to carcinoma of the lung. Dr. Caffrey also stated, based on citations to medical literature, that Miner's coal dust exposure did not cause or contribute to Miner's development of lung carcinoma. Dr. Caffrey set forth clinical observations and findings, and he relied upon adequate data to support his conclusions. His opinion is reasoned and documented. I find that Dr. Caffrey's opinion is entitled to probative weight. However, Dr. Caffrey did not address the relationship or effect of Miner's COPD due, at least in part, to coal dust exposure on the time and manner of Miner's death from lung cancer.

On August 21, 1995, Dr. Branscomb issued a consultative opinion based on his review of Miner's medical records. He opined that there was no occupational pulmonary disease, no impairment caused or aggravated by coal dust exposure, nor was Miner's death in any way caused or hastened by coal dust exposure or CWP. Dr. Branscomb stated that he would address the issue of Miner's death with the assumption that Miner did in fact have CWP as well as discussing the issue on his finding that there is no CWP. He then commented on a judge's finding of pneumoconiosis. He also made references to certain medical records, but he did not provide a summary or list of the medical records he reviewed. Dr. Branscomb then provided four numbered paragraphs under the heading of "CONCLUSIONS," four numbered paragraphs under "CONCLUSIONS, ASSUMING CWP IS PRESENT," and four answers to four questions under a heading of "RELATION TO SMOKING." Under the first conclusions heading, Dr. Branscomb stated that Miner did not have CWP and that his death would have occurred at

exactly the same time and in the same way had he never been a miner. He opined that Miner's death was due to lung cancer caused by cigarette smoking. Dr. Branscomb noted that Miner also had mild to moderate COPD that was neither caused by or aggravated by coal dust exposure. Under the second conclusions heading, assuming the presence of CWP, Dr. Branscomb opined that pneumoconiosis did not cause the COPD, the COPD did not cause the cancer, and neither the CWP nor the COPD contributed to the time and manner of his death from cancer.

Dr. Branscomb noted that Miner had widespread metastases, cancer of the larynx, severe heart problems, and a terminal state on which a "no code" was ordered. Dr. Branscomb set forth clinical observations and findings. On occasion he relied upon objective data to support his reasoning. However, some of his conclusions were not supported by adequate data or contained incomplete reasoning. For instance, Dr. Branscomb, when he was under the assumption of the presence of CWP, opined that neither Miner's CWP nor Miner's COPD from cigarette smoking caused or contributed to the time and manner of Miner's death. This conclusion was followed by a notation to the other medical problems that Miner suffered from at the time of his death, but it is insufficient to provide adequate reasoning and documentation to his conclusion that Miner's assumed CWP or COPD from smoking did not contribute to the time and manner of Miner's death. Additionally, even when he stated that he was assuming the presence of mild, simple CWP, he continued to hold that Miner's COPD was solely caused by cigarette smoking. I have already determined that a preponderance of the evidence establishes that Miner's COPD was due, at least in part, to coal dust exposure. Thus, the preponderance of the evidence contradicts the predicate forming the foundation of Dr. Branscomb's conclusions regarding the relationship of COPD and CWP to the time and manner of Miner's death.

The evidence firmly establishes that direct cause of Miner's death was lung cancer. The opinions of Drs. Norsworthy, Caffrey, Branscomb, and Broudy all reach this conclusion. However, Dr. Norsworthy was the only physician to render a reasoned and documented opinion regarding the effect of Miner's COPD due, at least in part, to coal dust exposure (legal pneumoconiosis) on the time and manner of Miner's death. His opinion that Miner was not a surgical candidate for resection of his cancer because of Miner's overall poor pulmonary condition, which was due in part to Miner's legal pneumoconiosis, is not refuted by a contrary reasoned medical opinion. In fact, it is somewhat confirmed by the opinions of Dr. Broudy and Dr. Edds. Dr. Norsworthy, even though he did not have the benefit of reviewing Miner's medical records at the time of his deposition, evinced sufficient memory of Miner's condition to render a reasoned medical opinion in light of the amount of medical evidence he was privy over the last nine-months of Miner's life. Dr. Norsworthy's opinion establishes that Miner's legal pneumoconiosis hastened his death because it prevented surgical intervention to resect his lung, which reduced the effectiveness of radiation therapy. The opinions of Drs. Branscomb and Caffrey, due to their failure to adequately address the effect of Miner's legal pneumoconiosis on the time and manner of Miner's death, are not as probative as Dr. Norsworthy's opinion. Knowledge of the credentials of Drs. Branscomb and Caffrey would not change the apportionment of probative weight between the opinions of Drs. Norsworthy, Branscomb, and Caffrey because superior and relevant credentials on the part of Drs. Branscomb and Caffrey would not cure the comparative deficiencies in their analysis with respect to Dr. Norsworthy's opinion on the relationship of Miner's legal pneumoconiosis to the time and manner of Miner's death from lung cancer; my apportionment of probative weight is based on the better-quality of

Dr. Norsworthy's reasoning. Therefore, I find that Miner's death was hastened by pneumoconiosis arising out of coal mine employment under § 725.205(c)(2).

Entitlement

The evidence establishes that Miner's death was due to pneumoconiosis arising out of coal mine employment. The conditions of entitlement for a surviving spouse are found at § 725.212. An individual who is the surviving spouse of a miner is eligible for benefits if such individual has not re-married, was dependent on the miner at the pertinent time, and establishes that the deceased miner's death was due to pneumoconiosis. § 725.212(a). A surviving spouse is entitled to benefits for each month, beginning with the first month in which all of the conditions of § 725.212 are satisfied. § 725.213(a). The last month for which a surviving spouse is entitled to such benefits is the month before the month in which the surviving spouse marries or dies. § 725.213(b). The record establishes that Ethel Eversole was a surviving, dependent spouse of Miner at the time of Miner's death. *See* §§ 725.214, 725.215. Miner died in August of 1994, and Ethel Eversole died in April 2001. Thus, Ethel Eversole was entitled to benefits from August 1994 through March 2001.

Attorney Fees

A representative seeking a fee for services on behalf of Ethel Eversole shall make an application to the undersigned Administrative Law Judge, which is to be filed and served on the undersigned and all parties within thirty-days of the issuance of this Decision and Order. The Parties have 10 days following receipt of any such application within which to file their objections. The Act prohibits the charging of any fee in the absence of such approval. *See*, §§ 725.365 and 725.366.

ORDER

IT IS ORDERED that:

1. Joan Wallace is dismissed as a party to this proceeding;
2. the claim of J.C. Eversole for living miner benefits under the Act is hereby GRANTED;
3. the claim of Ethel Eversole for survivor benefits under the Act is hereby GRANTED; and
4. Peabody Coal Company shall reimburse the Black Lung Disability Trust Fund in the amount of \$55,581.07 for benefits paid prior to the final adjudication of the living miner and survivor claims;

5. From the date of Ethel Eversole's death up to the date of issuance of this decision and order, no party has filed a motion for substitution on behalf of Ethel Eversole, nor has any party filed a claim for benefits based on their relationship to J.C. Eversole; and

6. As a consequence of this decision and order, and aside from the order directing Peabody Coal Company to reimburse the Black Lung Disability Trust Fund, no other person is entitled to receive any benefits.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. **A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.**